STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2012
v WILLIAM MORTON, Defendant-Appellant.	No. 294823 Wayne Circuit Court LC No. 08-018563-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DEVON BELL a/k/a DEVON CHEO BELL, Defendant-Appellant.	No. 295573 Wayne Circuit Court LC No. 08-018563-FC

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 294823, defendant William Morton appeals as of right his jury trial[1] convictions of first-degree murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

In Docket No. 295573, defendant Devon Bell appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227.[2] We affirm.

[1] Morton was tried simultaneously with codefendants Devon Bell and Derryck Brantley, but had a separate jury.

[2] Bell and codefendant Brantley had one jury. Brantley was ultimately acquitted of all charges.

This case arises from gang-related shootings[3] that occurred on October 16, 2008, outside of Henry Ford High School ("HFHS") in Detroit, which resulted in the death of Christopher Walker and injuries to Kejuana McCants, Maleek Slater, and Leon Merriweather.

I. Docket No. 294823

Morton challenges his convictions for first-degree murder and assault with intent to murder based on insufficiency of the evidence. A defendant's constitutional right to due process is invoked by a claim of insufficient evidence, which is reviewed de novo on appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[T]his Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

The elements of first-degree murder, MCL 750.316, include that the defendant killed the victim and that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002) (citations omitted). Premeditation and deliberation require sufficient time to permit a perpetrator to reconsider his actions or time to "take a second look." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "Premeditation and deliberation may be inferred from the circumstances, and minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010), aff'd in part and vacated in part on other grounds, 490 Mich 921 (2011). Premeditation and deliberation can be established by evidence demonstrating: (a) the existence of a previous relationship between the defendant and the victim; (b) a defendant's actions or behavior before the killing; (c) the circumstances involved in the killing, including the type of weapon used and the location of the wounds that are inflicted; and, (d) a defendant's conduct following commission of the offense. *Abraham*, 234 Mich App at 656.

A defendant may also be vicariously liable for a murder premised on an aiding and abetting theory. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992), overruled on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). The elements of aiding and abetting are:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).]

[3] Evidence indicated that Morton was a member of BCB-AL (Burgess, Chapel, Blackstone Across Lahser). The murder victim, Christopher Walker, was acknowledged to be a member of the FOE-Life gang (Family Over Everything).

For a conviction of assault with intent to murder, the following elements must be proven: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing a murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime." *Id*. "The intent to kill may be proved from any facts in evidence" and, [b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id*. Further, "[a]ll conflicts in the evidence must be resolved in favor of the prosecution." *Id*. A "jury may infer [a defendant's] intent to kill from the manner of use of a dangerous weapon . . . ." *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

Numerous witnesses confirmed that Morton and Walker were members of rival gangs and involved in a fistfight earlier in the day. The presence of weapons was not observed at the time of this first altercation. Between the time of the fistfight and shootings, evidence was submitted that Morton was using his cellular telephone and that students at HFHS were verbally indicating "time for some gun play." HFHS student Brandy Patterson testified that later in the afternoon, immediately before the shooting, she saw Morton with weapons outside the school. One of the victims, Maleek Slater, testified that he observed Morton firing a gun in his direction. Janay Greer asserted she saw Morton shoot toward a group of students. While recanted, there was evidence that Jonathan Kinchen told police that he observed Morton exit a black Mazda and shoot into the crowd. Morton's codefendant, Brantley, also identified him as the shooter. Gunshot primer residue tests indicated that the samples taken from Morton the evening of the shooting were positive. Forensic evidence established the use of at least two weapons, an assault rifle and a handgun. The use of these weapons and the location of the victims' gunshot wounds permit an inference of premeditation and deliberation, *People v Berry*, 198 Mich App 123, 129; 497 NW2d 202 (1993), and an intention to kill, *Dumas*, 454 Mich at 403.

Even if not specifically identifying Morton as the shooter, other witnesses placed Morton at the scene and with individuals affiliated with the BCB-AL gang. Text messages involving Morton suggested a plan to meet with other BCB-AL gang members at HFHS, implying an intent to engage opposing FOE-Life gang members in memory of or in retribution for a deceased friend, "To-To." After the shooting, text messages were exchanged encouraging Morton to attend school and indicating a concern by Morton that "Word around that I was the shooter." There was no evidence to substantiate Morton or Bell's suggestion that Walker or other members of the FOE-Life gang were similarly armed.

While mindful of contradictory testimony in addition to the inconsistencies and recanting of testimony by various witnesses, there remains sufficient evidence to support Morton's convictions for first-degree murder and assault with intent to kill, as any such discrepancies pertain directly to credibility, which is a determination for the finder of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). "In general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Id*. at 643. Thus, Morton's challenge to the sufficiency of the evidence is without merit.

Morton next challenges the trial court's admission of testimony by Terrance Clemons that he was afraid to testify despite the absence of any evidence or suggestion that the witness had been threatened by Morton. "To preserve an evidentiary issue for review, a party opposing the

admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Morton's counsel placed a relevance objection on the record in response to the prosecutor's question to Clemons as to whether he was reluctant to testify in this matter. To the extent that trial counsel objected on the basis of relevance, the issue is preserved for appellate review. Morton's assertion of error that Clemons' statement was inadmissible based on the lack of evidence that he threatened or intimidated Clemons is not properly preserved.

"The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when the trial court's decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An unpreserved claim is reviewed for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Because of the inability to secure Clemons' attendance at these proceedings, a bench warrant was executed for his arrest. When brought into the courtroom, Clemons was wearing jail-issued clothes. Clemons testified that he failed to appear as requested because of transportation problems and a failure to awaken in time. When asked whether he was reluctant to testify in this case, Clemons said: "Yes. I feel like – I don't know, maybe my family might be put in danger, you know." Clemons also admitted during his testimony that he had a prior conviction for theft of an automobile.

In general, all relevant evidence is admissible. MRE 402; *Starr*, 457 Mich at 497. The credibility of witnesses always constitutes a material issue. As a consequence, any evidence that demonstrates bias or prejudice by a witness is relevant. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). This trial involved three defendants and the prosecutor's theory of the case focused on the gang-related nature of the crime. Walker, Morton, and Bell were all identified as gang members, but there was no evidence that Morton threatened any witness.

Throughout the trial, numerous witnesses gave testimony that was inconsistent with statements they had previously given to police, recanted their earlier statements, or purportedly lacked any recall of those statements. More than one witness indicated a reluctance to testify at trial. Clemons' appearance on the witness stand in jail clothing necessitated explanation to the jury. The contested testimony was very brief and isolated in this 18-day trial, as well as fairly insignificant in that Clemons had given other reasons for his absence from the trial and also used the words "maybe" and "might." Further, Clemons was related to Walker, for reasons of possible bias, his veracity was suspect.

The credibility of this witness was a probative issue given his relationship to the victim and his previous conviction for a theft crime. It is difficult to give credence to Morton's contention that this brief and fairly insignificant response was prejudicial given the plethora of evidence of guilt in this case. Any implication that Clemons' fear of testifying was because of Morton is minimized by the lack of evidence as well as the fact that Clemons did not identify Morton as the shooter. This Court has previously found no error in a prosecutor questioning or eliciting such a statement from a witness if for the proper purpose of explaining either a reluctance to testify or discrepancies in prior testimony. *People v Kelly*, 231 Mich App 627, 640;

588 NW2d 480 (1998); *People v Clark*, 124 Mich App 410, 412; 335 NW2d 53 (1983). In this case, in light of the circumstances, including the obvious credibility concerns, it was not error to admit testimony or evidence that would assist the jury's evaluation of his veracity. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

Morton also contends the trial court erred in refusing to grant his request for the criminal jury instruction regarding common unlawful enterprise, CJI2d 8.3. This Court reviews for an abuse of discretion "a trial court's determination whether a jury instruction is applicable to the facts of the case." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

In general, a defendant is entitled to a jury instruction that is supported by the evidence. *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). Morton's theory at trial was that the common plan was merely to engage in another physical altercation or fistfight rather than a shooting or killing of the victim and that he could only be convicted of the murder if the killing was within the scope of the common plan. Morton requested the trial court provide CJI2d 8.3, comprising an aiding and abetting instruction addressing separate crimes within the scope of a common unlawful enterprise. The trial court questioned counsel as to the factual support for the instruction and opined, "it would seem that mere presence and aiding and abetting would cover all of the factual issues on that." Counsel responded that: "it's our contention that we had no – there is nothing with respect to any type of planning or design. There is no intent shown on the record that my client intended to commit that particular act." Before the start of closing arguments, the trial court denied the requested jury instruction.

"Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). It is clear that the court refused to provide the requested jury instruction because it was not supported by the evidence. Specifically, there was no evidence to support Morton's claim that the common plan was merely to engage Walker or other FOE-Life members in a fistfight rather than to kill them.

The existence of an intent to kill can be inferred from any evidence admitted. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Morton had a fistfight with Walker, a member of a rival gang, earlier in the day. No weapons were seen at that time. Two or three hours later, Morton and another individual are identified as being present outside HFHS, with an AK-47 rifle and a handgun, waiting for classes to dismiss. Various text messages recovered from the previous day and throughout the day of the shooting suggested that some form of confrontation was imminent. At least 13 shots were fired and several witnesses indicated that the weapons were aimed directly by the shooters toward Walker and the others in his group. Morton's use of a deadly weapon leads to a reasonable inference that he possessed an intent to kill. *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). While alleged, there was no evidence that any member of FOE-Life was armed at the time of the shooting. In light of the evidence, the trial court correctly determined that CJI2d 8.3 was inapplicable and Morton was not denied due process by the trial court's refusal to provide the instruction.

In his Standard 4 brief, Morton raises several issues beginning with the trial court permitting the use of autopsy photographs despite his willingness to stipulate to the nature and

cause of Walker's death. "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *Aldrich*, 246 Mich App at 113. An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"[T]he prosecution may offer all relevant evidence, subject to MRE 403, on every element" when a defendant tenders a plea of not guilty to a crime. *Mills*, 450 Mich at 70. A defendant's offer to stipulate to certain elements does not alter this principle for those elements. *Id*. at 71. Morton was charged with first-degree murder, which necessarily includes the element of causing the death of another person. Consequently, the prosecution was entitled to offer all relevant evidence establishing that Walker's death was the result of Morton's actions. Any photographs depicting Walker's corpse would be relevant and, therefore, admissible subject only to MRE 403.

MRE 403 provides, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Photographs are not deemed inadmissible simply because a witness is able to testify about the information contained in the photographs. *Mills*, 450 Mich at 76. In addition, it is accepted that photographs are admissible to corroborate the testimony of a witness, and a photograph's "[g]ruesomeness alone need not cause exclusion." *Id*. The applicable analysis is whether the probative value of the photograph is substantially outweighed by its unfair prejudice. *Id*.

The photographs served to corroborate the medical examiner's testimony regarding the nature and location of Walker's wounds and were not so gruesome or explicit to excite passion from the jury. The photos simply depicted entry and exit wounds to Walker's face, head, and chest. The photographs were neither inflammatory nor shocking and there is nothing regarding their content or depiction that would suggest they were calculated to arouse the sympathies or prejudices of the jury. As a result, any possibility of unfair prejudice did not substantially outweigh the probative value of the photographs and the trial court's decision to admit the photographs did not comprise an abuse of its discretion.

Morton further contends the prosecutor committed numerous acts of misconduct, including misstating the evidence, using the age of the victim to appeal to the jury's sympathy, and making an improper civic duty argument. And Morton contends in his Standard 4 brief that his trial counsel was ineffective for failing to object to the prosecutor's comments.

To preserve a claim of prosecutorial misconduct, a defendant is required to contemporaneously object or request a curative instruction. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Any objection must be based on the same grounds that the defendant raises on appeal. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Because Morton did not object to the alleged statements by the prosecutor in the trial court, they are not properly preserved for appellate review. In general, this Court reviews claims of prosecutorial misconduct on a case-by-case basis, and reviews the challenged remarks in context.

People v Noble, 238 Mich App 647, 660; 608 NW2d 123 (1999). Because Morton failed to object to any of the alleged instances of misconduct in the trial court, review of these unpreserved claims is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice." *Brown*, 279 Mich App at 134 (citations omitted).

To preserve a claim of ineffective assistance of counsel for appellate review, a defendant is required to move for a new trial or a *Ginther*[4] hearing in the lower court. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Because defendant failed to request a new trial or seek a *Ginther* hearing, the issue is not preserved. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Effective assistance of counsel is presumed" and "[t]he defendant bears a heavy burden of proving otherwise." *Id*. A defendant is required to demonstrate that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result obtained would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Because the issue is unpreserved, this Court's "review is limited to mistakes apparent on the record." *Payne*, 285 Mich App at 188.

The prosecutor began her opening statement to Morton's jury, stating:

> What you are about to hear in this courtroom will seem foreign to most if not all of you, because it will be so far removed from what you know is reality; far removed from what you know as a lifestyle; far removed from what you know as the type of thing that can happen in the blink of an eye, as you go about your actual daily routine.
>
> But make no mistake about it, this case involves life and death. Life on the streets of Detroit and death on the streets of Detroit. A place where life can be cheap. A place where fear and intimidation rule. A place where guns abound. A place where the epitome of senseless violence and destruction, the cold-blooded and unwarranted obliteration of a human life means nothing to some. The place where a teen would loose [sic] his life.
>
> The senseless violence on October 16th, of last year, victim of a retaliatory hail of bullets deliberately fired; two of which would explode into this teen's chest and neck as he ran from his assassins. Two deadly bullets that would drop a teen literally dead in his tracks, collapsing him to the ground in a pool of blood. Two deadly bullets from a barrage of bullets that would snuff out a life, and wound three other teens as well, as they all walked home from what should have

[4] *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973).

> been a place of safety and refuge for three of the four victims; their own high school, Henry Ford High School, here in the City of Detroit.
>
> This trial will tell that story. Not only the story, but the final chapter in the life of a 16 year old boy who died alone in a crowd, in a pool of blood, in an agonizing manner. That, ladies and gentlemen of the jury, was the scenario that was played out on October 16th of last year.

The prosecutor indicated that the "fight began when Mr. Morton antagonizing [sic] Mr. Walker by yelling at him in the hallway: BCB." The prosecutor also made several references regarding the ages of the victims. During the abbreviated questioning of Walker's mother, Bridget Walker, the prosecutor asked to verify Walker's age and Bridget confirmed that he was "sixteen." The medical examiner, Bernardino Pacris, MD, also verified that Walker was sixteen years of age.

In closing argument, the prosecutor made the following statements or references relevant to Morton's allegations of prosecutorial misconduct:

> Surely when you are sixteen years old, your world doesn't end like this, on a sunny fall afternoon, crumbled in a heap, in a pool of blood, at the hands of persons who make cold and conscious decision to obliterate a human life. But it did for Christopher Walker, it did end that way. . . .
>
> Don't think I don't understand that it's not easy to sit up there, and say, well, they look young. The deceased was young too. And the truth is, this wasn't [sic] an adult crime . . . .
>
> Well, we know that later that day in the early afternoon hours that the defendant got into a fight with Christopher Walker, and we know that that fight started. When the defendant walks up to Mr. Walker in the hallway and says To-To, and says what's up, BCB, Christopher Walker responded to that. No question. Fist fight ensues. . . .
>
> Anyone who gives any form of assistance to a crime, has the same mind-set, which there can be no question about what your mind set is when you are firing an automatic weapon and handgun into a crowd of children. . . .
>
> When the defendant walked up to Christopher Walker in school and says To-To says what's up; clearly defendant Morton had selected his target. . . .
>
> Ladies and gentlemen of the jury, what happened on October 16th of last year was horrific, savage, brutal, and completely unjustified, by any circumstances imaginable, and even those words don't do this crime justice.
>
> How could there be enough justice for the ruthless, obliteration of human life? How could there be enough justice for three teenagers wounded for no good reason? How could there ever be enough justice for the terror, panic, and pain suffered by Christopher Walker in the last moments of his life?

> The unfortunate truth; the unfortunate truth is there never could be. . . .
>
> The unfortunate truth, the unfortunate truth is that a human life has been recklessly, and ruthlessly obliterated, and there will never be enough justice for that.

As discussed by this Court in *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007) (internal quotation and citations omitted):

> Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. The propriety of a prosecutor's remarks depends on all the facts of the case. A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel.

In her opening statement, the prosecutor referenced the ages of the victims, the level and severity of violence in the community, and implied the motivation for the killing as gang-related, by noting that Morton yelled the term "BCB" to Walker at the time of their fistfight. All references to the ages of the victims and the suggestion that the violence stemmed from gang activity were supported by the subsequent admission of evidence. Kinchen testified that he overheard Morton state, "227. What's up. BCB-AL, all day" to Walker before the initial altercation. Several witnesses confirmed that Morton, Walker, and others were members of rival gangs. To convey the setting and events pertaining to the charged offenses, the prosecutor set the scene by accurately indicating the ages of the victims and the location of the shooting at the conclusion of a school day at HFHS.

"[P]rosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996) (citation omitted). Because the prosecutor's opening remarks were supported by evidence at trial, these remarks did not deprive Morton of a fair trial and did not constitute misconduct. *Unger*, 278 Mich App at 241. In closing arguments, the prosecutor indicated that Morton approached Walker before their initial altercation inside the school and made reference to "To-To." This reference was in error as it did not fully comport with the evidence. *Id.* But these isolated misstatements were brief and the jury was fully capable of identifying the error based on 18 days of trial testimony. Such a misstatement cannot be deemed to be so prejudicial, given the substantial evidence presented, to have denied Morton a fair trial or to have resulted in a miscarriage of justice. *Brown*, 279 Mich App at 134. Further, "even if this comment had been improper, any prejudicial effect could have been dispelled by a timely objection and curative instruction." *Id.*

Similarly, references to Walker's age and the ages of the other victims were consistent with the evidence and, taken in context, provided an explanation of the factual circumstances surrounding the charged crimes rather than to elicit sympathy. This is particularly true given the repeated acknowledgement that Walker was also a gang member. Further, references by the prosecutor to crime in Detroit were not suggestive of a need to convict Morton to control crime, but merely to set the stage for the events that transpired and explain factors in the community that contributed to the events and their unfolding. "Emotional language may be used during closing argument and is 'an important weapon in counsel's forensic arsenal.'" *Ullah*, 216 Mich App at 679 (citation omitted).

The prosecutor acknowledged that her comments or arguments were not evidence. And the trial court instructed the jury that "lawyers' statements and their arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." The trial court also instructed the jury that sympathy must not dictate their verdict. It is assumed that the jurors complied with these directives, as "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under the circumstances presented, including that the vast majority of the prosecutor's comments conformed to the evidence and were within the realm of proper argument, Morton's claim of prosecutorial misconduct fails.

Morton further asserts his trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct. "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003).

Where, as here, no prosecutorial misconduct occurred, Morton's trial counsel was not ineffective for failing to make futile objections. *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). Even when the misstatements occurred in closing argument by the prosecutor, "[a]s an experienced attorney . . . defense counsel was certainly aware that 'there are times when it is better not to object and draw attention to an improper comment.' Furthermore, declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242 (citations omitted). This Court will not substitute its judgment "for that of counsel on matters of trial strategy" and will not "use the benefit of hindsight when assessing counsel's competence." *Id*. at 242-243. Further, there is no evidence to suggest that, but for the alleged errors by Morton's counsel, the outcome of his trial would have been any different given the plethora of evidence supporting his convictions. *Id*. Consequently, Morton's contention of ineffective assistance of counsel for failure to object to alleged misconduct by the prosecutor is without merit.

Finally, Morton also challenges the effectiveness of his counsel in failing to object to or secure suppression of testimony by Detroit Police Department Detective Edward Price and Officer Denny Borg regarding various text messages and the alleged meaning of gang jargon.

Because the issue is unpreserved, this Court's "review is limited to mistakes apparent on the record." *Payne*, 285 Mich App at 188.

As discussed previously by this Court in *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001):

> To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. A defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. Furthermore, this Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. [Citations omitted.]

Morton asserts his counsel's cross-examination of Detective Price was ineffective. "Decisions regarding what evidence to present and whether to . . . question witnesses constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense." *Id*. A substantial defense has been defined as "one that might have made a difference in the outcome at trial." *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990). Counsel's cross-examination of this witness spanned approximately 39 pages of transcript. Contrary to Morton's contention, counsel repeatedly challenged Price regarding his theory and opinions pertaining to the various text messages and solicited admissions from Price that the messages did not contain any explicit words supporting his theory regarding the purpose of the messages exchanged. Counsel further emphasized in his colloquy with Price that Price's testimony regarding the interpretation of meaning of the text messages constituted solely an opinion subject to jury scrutiny. The record does not, therefore, support Morton's contention that counsel's performance in the cross-examination of Price was ineffective or deficient in any manner. In addition, even if counsel's performance were deemed ineffective, Morton is unable to establish that he was prejudiced by such performance given the substantial evidence presented pertaining to his guilt.

Morton incorrectly contends that counsel was ineffective for failing to challenge Borg testifying as an expert in gang jargon. Counsel specifically objected "to his speculation and his qualifications in the field" and asserted the witness "is not needed to assist the trier of fact." Despite objections to the qualifications of this witness, the trial judge permitted Borg to testify in accordance with MRE 702. Testimony by an expert is deemed permissible when the testimony will assist a jury to understand evidence or factual issues, particularly when lay people would not possess the requisite knowledge. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). "The critical inquiry, however, is whether such testimony will aid the factfinder in making the ultimate decision in the case. Further, opinion testimony will not be excluded simply because it embraces an ultimate issue to be decided by the trier of fact." *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

Gang membership and the underlying patterns of behavior and jargon were relevant to prove motive. Thus, the testimony was presented for a proper purpose and its probative value was not substantially outweighed by any unfair prejudice. MRE 403. As the testimony was admissible because it was "helpful in throwing light [on a] material point," *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009), there is no basis for Morton's contention that his counsel was ineffective for failing to have this witness disqualified. (See, also, *People v Gonzalez*, 256 Mich App 212, 223; 663 NW2d 499 (2003) and *United States v Hankey*, 203 F3d 1160, 1167-1170 (CA 9, 2000), permitting testimony on gangs or gang-related matters.) Further, any error was cured by the instruction to the jury that they need not believe the testimony or interpretation of the witness.

To the extent Morton suggests trial counsel was ineffective for failing to obtain suppression of the text messages submitted into evidence, this assertion of error is also without merit. All relevant evidence is deemed to be admissible in trial. MRE 402. Relevant evidence is defined as comprising "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." MRE 402. The prosecution sought admission of evidence comprised of text messages indicative of a plan or premeditation by defendants to the killing that occurred. "Although motive is not an essential element of the crime, evidence of motive in a prosecution for murder is always relevant." *Unger*, 278 Mich App at 223. Because the text messages were relevant to the element of premeditation in the murder charge, the trial court did not err in their admission.

II. Docket No. 295573

Defendant Bell contends he was denied his constitutional right to a fair trial and to present a defense because the trial court refused to grant his request that a manslaughter instruction be provided to the jury.

To preserve a jury instruction challenge, a party is required to object to the proposed instruction or request a different instruction be provided before the jury initiates deliberations. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000), citing MCL 768.29. The trial court rejected Bell's request for a jury instruction on voluntary manslaughter. Although Bell's assertion that an instructional error occurred is properly preserved for appellate review, his claim that he was denied a fair trial and the right to present a defense are not preserved for appellate review as these issues were not raised or addressed by the trial court. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (citation omitted) ("An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground."). This Court reviews for an abuse of discretion "a trial court's determination whether a jury instruction is applicable to the facts of the case." *Gillis*, 474 Mich at 113. Unpreserved claims of instructional error are reviewed for plain error affecting defendant's substantial rights. *Aldrich*, 246 Mich App at 124-125.

Defense counsel for Bell requested a jury instruction for "manslaughter as a lesser included offense of the murder charge," premised on a theory that members of the FOE-Life gang were armed rendering the actions taken by members of BCB-AL to be in self defense and in the heat of passion. The trial court denied the request based on the absence of evidence to support the instruction.

Voluntary manslaughter is defined by common law as an intentional act. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991) (footnote added).[5] "An essential element of [this crime] is the intent to kill or commit serious bodily harm." *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). To convict a defendant of voluntary manslaughter there must be a demonstration that: "(1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Specifically, "[t]he degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. In order for the provocation to be adequate it must be that which would cause a reasonable person to lose control." *Id*. at 714-715 (internal citations and quotation marks omitted). "[A]n instruction on a lesser offense need only be given if a rational review of the evidence indicates that the element distinguishing the lesser offense from the greater offense is in dispute." *McGhee*, 268 Mich App at 607. Our Supreme Court has determined that "[m]anslaughter is an inferior offense of murder because manslaughter is a necessarily included lesser offense of murder." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

The evidence presented in this case does not support Bell's request for an instruction on manslaughter. Testimony indicated that Bell and Morton were outside HFHS with weapons before the final dismissal of classes. Bell was not a student at HFHS. Prezelle Cunningham testified that he saw Bell holding a handgun pointed in his direction and shooting. While Morton had been involved in an altercation with Walker earlier in the day, no evidence was adduced to demonstrate Bell's presence or participation in this fight. Testimony confirmed that Walker was in class and did not exit to the area where Bell and Morton were until final dismissal, precluding any immediate precipitating event or interaction. There was no evidence that Walker was armed or had presented any immediate threat to Bell or Morton before the shooting erupted. Based on the lack of evidence to suggest that this shooting occurred in the "heat of passion," *Tierney*, 266 Mich App at 714, there was no rational basis for provision of the requested instruction, *McGhee*, 268 Mich App at 607.

Bell relies on the fact that his jury received a deadlock instruction in support of his claim that it was error not to give the manslaughter instruction. However, the jury was deliberating the fate of both Bell and Brantley. There was no indication in the transcripts or the note received by the trial court regarding which of these two defendants the jury sought instruction, and, as the trial court observed, the jury had indicated having reached a verdict on one defendant and "making no progress on the verdict for the second." Further, having received an instruction from the trial court to continue its deliberation, the jury was subsequently able to reach a verdict.

Finally, Bell contends he was denied his constitutional right to confrontation because the trial court admitted into evidence text messages by Brantley, Morton, and a non-testifying third party. Bell objected to the admission of the text messages on the basis of their relevance, but did

[5] The punishment for the crime of manslaughter is specified in MCL 750.321. *Pouncey*, 437 Mich at 388.

not object on the ground that admission of the evidence violated his right of confrontation. Consequently, the constitutional issue is deemed unpreserved, *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003), but the issue regarding the admissibility of the evidence based on relevance was properly preserved for this Court's review. "The decision to admit evidence is reviewed for an abuse of discretion. When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Whether the admission of evidence constitutes a violation of a defendant's rights under the Confrontation Clause is a question of constitutional law that this Court reviews de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). "When reviewing an unpreserved error, the defendant must show a plain error that affected substantial rights." *Bulmer*, 256 Mich App at 35.

The constitutional right of a defendant to confront witnesses is implicated only by the admission of testimonial statements. *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). "While nontestimonial statements are subject to traditional rules limiting the admissibility of hearsay, they do not implicate the Confrontation Clause." *Id.* In *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (internal citations omitted), the United States Supreme Court explained:

> The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to "witnesses" against the accused-in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

As the text messages comprised non-testimonial statements, *Taylor*, 482 Mich at 378, their admissibility was subject solely to the applicable rules of evidence. *Id.*

Morton exchanged a number of text messages with Ryan Houston. Evidence existed that both of these individuals were members of the BCB-AL gang. The text messages admitted between Brantley and Patterson were consistent with verbal testimony by Patterson. Bell's objection to the text messages was based on their lack of relevance, and the trial court's decision to admit the messages as evidence was based on its determination that they were relevant. "Evidence is relevant when it has a tendency to make a material fact more or less probable." *McGhee*, 268 Mich App at 610. "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *Id.* In this instance, motive was relevant as defendants were on trial for murder. *Unger*, 278 Mich App at 223. Consequently, there was no error by the trial court in admission of the evidence based on relevancy.

While unpreserved, Bell contends on appeal that the evidence was not admissible due to the failure to independently establish the existence of a conspiracy and, therefore, was not in conformity with the requirements of MRE 801(d)(2)(E), which defines a statement as not

comprising hearsay "if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." As previously discussed by this Court in *People v Martin*, 271 Mich App 280, 316-317; 721 NW2d 815 (2006):

> In order to qualify under the exclusion for statements by a coconspirator, the proponent of the statements must establish three things. First, the proponent must establish by a preponderance of the evidence that a conspiracy existed through independent evidence. A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective. It is not necessary to offer direct proof of the conspiracy. Instead, it is 'sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact.' Circumstantial evidence and inference may be used to establish the existence of the conspiracy. Second, the proponent must establish that the statement was made during the course of the conspiracy. The conspiracy continues 'until the common enterprise has been fully completed, abandoned, or terminated.' Third, the proponent must establish that the statement furthered the conspiracy. The requirement that the statement further the conspiracy has been construed broadly. Although idle chatter will not satisfy this requirement, statements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice.

There was evidence presented that Bell was a member of the gang identified as 7-Tel, which was affiliated with the BCB-AL gang, of which Morton and Houston were members. Testimony demonstrated that Morton approached Walker earlier in the day, stating "BCB-AL." Kelvin Boyd, a close friend of Brantley, acknowledged that he was contacted by Bell and told of the earlier altercation between Walker and Morton. Despite not being students at HFHS, both Bell and Brantley arrived at the school before the conclusion of classes. Testimony established that Bell and Morton possessed firearms at the school and were with members of BCB-AL. Morton was observed withdrawing a long gun from the trunk of a car identified as being similar to the one driven by Brantley. Bell was positively identified as one of the shooters or in close proximity to Morton. Brantley phoned Houston within minutes following the shooting. Physical evidence demonstrated gunshot primer residue particles on or about Bell, Morton, and Brantley. When viewed in context and in its entirety, the evidence was sufficient to establish the existence of a conspiracy, *Martin*, 271 Mich App 316-317, rendering the challenged evidence admissible under the rules of evidence.[6]

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[6] MRE 801(d)(2)(E).